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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 74-532

CHESTER McKINNEY,
PETITIONER,

VS.

THE STATE OF ALABAMA
RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT OF THE RESPONDENT AND REPLY TO AMICI CURIAE AND APPENDICES

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT FOR RESPONDENT

OPINIONS BELOW

The Judgment of the Circuit Court of Jefferson County, Alabama affirmed without opinion by the Court of Criminal Appeals of Alabama. This order is not reported.

The opinion of the Supreme Court of Alabama affirming the Judgment of the Court of Criminal Appeals of Alabama is reported as follows:

McKinney v. State 292 Ala. 484, 296 So. 2d 228 (1974)

JURISDICTION

The jurisdiction of this honorable court is invoked under 28 U.S.C. 1257(3). The writ was granted on June 23, 1975.

QUESTIONS PRESENTED

1. Where a publication is determined to be obscene in an *in rem* proceeding, pursuant to a state statute, by a court of competent jurisdiction which has before it a copy of the publication, following an adversary hearing, may such determination be considered binding as to the obscene status of the publication throughout the community, as defined by state law?

2. Does the decision of the Supreme Court of Alabama in this case, in the context of this record, stand for more than the proposition that the prior civil determination of obscenity, *vel non*, was *prima facie* evidence of obscenity? If not, is such a rule constitutional?

3. A. Does a State Obscenity Statute which requires proof that the accused (1) knew the contents of the alleged obscene material and (2) knew that it had been judicially declared obscene as conditions to conviction, meet the *scienter* requirements of the Constitution of the United States?

B. Does a complaint initiating an obscenity prosecution which alleges that the accused (1) knew the contents of the material and (2) knew that it had been judicially declared obscene, meet the *scienter* requirements of the Constitution of the United States?

C. In an obscenity prosecution, where the state proves the following:

1. The accused operated an "adult" bookstore,

2. The accused was served with a written notice that the material at issue had been judicially declared obscene, and

3. That immediately prior to the sale at issue, the accused was shown the contents of the material, has the state met the burden of proving *scienter* imposed by the Constitution of the United States?

4. Where a decision of the Supreme Court of the United States enlarges the definition of "obscenity" for purposes of the First Amendment and a State Supreme Court interprets a State Statute, passed before said decision, to require in those prosecutions initiated prior to said decision but which were still pending when it was rendered, that the materials at issue must be obscene under both the earlier and the later definitions of "obscenity", is such a statute as interpreted and applied repugnant to the Constitution of the United States?

STATUTORY PROVISIONS INVOLVED

Act No. 856 of the 1961 Session of the Alabama Legislature, unofficially codified at Title 14, Sections 374(1)-374(16) of the Code of Alabama, 1940 (recomp. 1958). This statute is voluminous and is included as Appendix "A" to this brief.

Act No. 698 of the 1969 Session of the Alabama Legislature, unofficially codified at Title 14, Sections 374(16j)-374 (16o), of the Code of Alabama 1940 (recomp. 1958). This statute is voluminous and is included as Appendix "B" to this brief.

For the convenience of this Honorable Court, the official and unofficial reports of these statutes are cross referenced in Appendix "C" of this brief.

STATEMENT OF THE CASE

I

THE ALABAMA STATUTORY SCHEME UNDER WHICH THE PETITIONER WAS CONVICTED

The petitioner attacks an Alabama Statutory Scheme. It would appear essential to this Honorable Court's consideration of this case, that this scheme be revealed as whole rather than in piecemeal fashion.

The statutory scheme under which the petitioner was convicted is based on two statutes passed nearly a decade apart.

The first of these is Act No. 856 of the 1961 Session of the Alabama Legislature. This Act will hereinafter be referred to as the "1961 Act". (See Appendix "A" to this Brief). This statute has been unofficially codified as Title 14, Sections 374(1)-374(16) of the Code of Alabama, 1940 (recomp. 1958). (The respondent submits an Appendix "C", a cross reference table for the convenience of the court.)

The 1961 Act provides criminal penalties for, among other things, the possession with intent to sell or selling any mailable matter with knowledge of its contents, known by the possessor or seller to have been judicially declared to be obscene. Section 4 (1) of the 1961 Act, Appendix "A". The Act further provides for an *in rem* adversary action for the judicial determination of the obscenity, *vel non*, of allegedly obscene materials. Sections 5-11 of the 1961 Act, Appendix "A".

The second statute which is relevant to this proceeding

is Act 698 of the 1969 Session of the Alabama Legislature. This Act will be hereinafter referred to as the "1969 Act". See Appendix "B" to this Brief. This Act is unofficially codified as Title 14, Sections 374(16j)-374(16o), Code of Alabama, 1940 (recomp. 1958) (See Appendix "C").

The 1969 Act provides criminal penalties for, among other things, selling obscene materials. Sections 2 and 3 of the 1969 Act. Appendix "B". The most relevant portion of the 1969 Act is Section 4. This Section forbids the commencement of any prosecution under the 1969 Act, unless the party to be prosecuted is first advised in writing, by one of certain specified officials, that there is reasonable cause to believe that specified materials which he is selling, etc., are obscene and the party sells, etc., the materials after such warning. Section 4 (a) and (b) of the 1969 Act, Appendix "B". The judicial constitution has held the written warning to be an absolute pre-condition to prosecution[1] and that it must be shown to have been actually served on the defendant.[2] The section further provides that upon receipt of such written warning, the party may within thirty (30) days thereafter seek Declaratory Judgment of the obscenity, *vel non*, of the materials. The statute provides that the commencement of such an action does not in itself act as a stay of the proceedings under the Act,[3] but preliminary in-

[1] McKinney v. Tuscaloosa 49 Ala. App. 21, 268 So. 2d 488 (1972).

[2] Bush v. Tuscaloosa 50 Ala. App. 44, 276 So. 2d 629 (1973).

[3] The reason for this provision is that the Declaratory Judgment action provided for by the Act is obviously to be a de novo proceeding in which the prior warning and the findings on which it was based would have no presumption of correctness and the Government would have the burden of proving obscenity. The commencement of such de novo actions automatically stay further proceedings unless the statute specifically provides otherwise. See Ex Parte State 282 Ala. 188, 78 So. 2d 322 (1955). Without this provision a purveyor of hard core pornography could, having received the warning, file for Declaratory Judgment and continue to sell his goods while the suit pended even though the materials are patently obscene under both the Constitution and the Statutes.

junctions or other temporary relief are available under the Rules of Civil Procedure.[4]

The petitioner was convicted under the 1961 Act, but he was first warned under the 1969 Act.

II

THE PROSECUTION OF THE PETITIONER

Following the petitioner's conviction in the Jefferson County Criminal Court and appeal therefrom, he was charged by complaint with exhibition, sale and possession with intent to sell a magazine, "New Directions", Number 16, Volume 4, with knowledge of its contents, knowing that it had been judicially determined to be obscene, in violation of Title 14, Section 374(4) of the Code of Alabama [Section 4 of the 1961 Act, Appendix "A"]. (R 19-22).

To the complaint, the Petitioner entered a plea of not guilty. (R. 34).

The evidence on the trial of the case was without conflict.

On February 26, 1970, the Circuit Court of Mobile County, Alabama, issued a final decree after an adversary

[4] A federal three judge court on January 5, 1975, ruled Section 4 (a) unconstitutional in that the warning required by it imposed a prior restraint on free expression; that court further ruled that the statute, the 1969 Act, was not severable and declared it invalid **in toto**, even though no other defects were found in it. **United Artists Corp. v. Wright** (M.D. Ala., 1974) 368 F. Supp. 1034. Subsequently, the Alabama Supreme Court in another case concurred in the invalidation of Section 4 (a) but held the statute to be severable, and, therefore, held the 1969 Act, less Section 4(a), to be constitutional. **Ballew v. State,** 292 Ala. 460, 296 So. 2d 206 (1974) cert. den. ——— U. S. ———, 42 L. Ed2d 830, 95 Sect. 816 (1975).

proceeding in conformity with the 1961 Act, discussed above. This decree declared the magazine "New Directions", No. 16, Volume 4, to be obscene within the meaning of the First Amendment and Alabama Law. (R. 100-102)

Twelve (12) days later, on March 10, 1970, Charles H. Barnes, an Assistant Attorney General, and D. H. Johnson, an investigator for the Alabama Attorney General's Office, went to the Paris Bookstall in Birmingham, Jefferson County, Alabama. The Paris Bookstall was a business establishment operated by the petitioner. The business was marked with a flashing neon sign reading "Paris Bookstall", there was a sign shaped like a woman reading, "Adult Bookstore", and there were signs inside and out reading, "For Adults Only". (R. 52-53, 65-68, and 73-75).

On that date, March 10, 1970, Mr. Barnes served the petitioner with a written notice that a number of magazines being offered for sale by the petitioner, including "New Directions", No. 16, Volume 4, had been judicially found to be obscene. The notice specified each of the magazines and gave the Court, case number and date of the decree declaring each of them to be obscene. The notice further stated that it was given pursuant "to Chapter 64A, Title 14, Code of Alabama, 1940 (recompiled 1958)", this being the unofficial codification of the Alabama law on obscenity and includes both the 1961 and the 1969 Acts, discussed above. When, on the trial of the case, the petitioner objected to the State's introducing a copy of the notice on the grounds of the Best Evidence Rule, the trial court initiated an inquiry into the whereabouts of the original. The State's witness stated that he had not seen the original of the notice since it was served on the petitioner. Counsel for the petitioner was asked to inquire of the petitioner concerning the original of the notice. Counsel, after the inquiry of the petitioner,

advised the Court that the Petitioner remembered receiving a letter from Mr. Barnes but that it was not available to the court. (R. 53-62 and 74-76).

Three (3) weeks after service of the notice, on March 31, 1970, Mr. Barnes and Mr. Johnson returned to the Paris Bookstall and found that the petitioner was still selling several of the magazines named in the notice, including "New Directions", Number 16, Volume 4. At that time, Mr. Barnes selected a copy of "New Directions", Number 16, Volume 4, and several other magazines. He flipped through the magazines in petitioner's presence showing them to the petitioner. The petitioner with reference to one of the other magazines, not "New Directions" but also one named in the notice, stated:

> "Oh, my God, here is one that I missed" (R. 93-95 and 97).

Mr. Johnson then purchased the magazines, including "New Directions", Number 16, Volume 4, from the petitioner. (R. 62-65, 76-77, 86-95 and 97)

When the State moved to introduce the magazine, the petitioner objected on the grounds, among others, that the sole issue in the case was whether or not the petitioner had after warning, sold a magazine which had been judicially declared to be obscene and, therefore, argued the petitioner, the magazine ought not be introduced, since the question of obscenity *vel non* was not at issue. The trial court agreed with the petitioner, but stated and ruled that the magazine would be evidence of the sale. The trial court continued;

> "The Court feels that it would be the court's duty to limit the purpose for which the magazine is admitted and to instruct the jury not to determine any questions of obscenity of the magazine." (R.81).

Subsequently, the magazine was introduced. (R. 80-82 and 86-88).

After the state rested, the petitioner moved to exclude the State's evidence, which motion was overruled. The defense offered no evidence. (R. 106-114).

The trial court charged the jury that the question of the obscenity of "New Directions" was not before them. The petitioner made no objection to this portion of the charge. (R. 120-122 and 123).

The petitioner was found and adjudged guilty and appealed to the Court of Criminal Appeals of Alabama. (R. 34-36). The Court of Criminal Appeals affirmed the conviction without opinion. On certiorari, the Supreme Court of Alabama affirmed the judgment of the Court of Criminal Appeals in *McKinney v. State* (292 Ala. 484, 296 So.2d 228 [1974]). (R. 2-8).

SUMMARY OF THE ARGUMENT

I. Assuming, *arguendo*, the accuracy of the petitioner's analysis of the Alabama Supreme Court's decision, the decision is clearly correct. Obscene materials are utterly without First Amendment protection. *Rosen v. United States* 161 U.S. 29, 40 L.Ed.606, 16 S.Ct. 434 (1896); *Roth v. United States* 354 U.S. 476, 1 L.Ed.2d 1498, 77 S. Ct. 1304 (1957); *Miller v. California* 413 U.S. 15, 37, L.Ed.2d 419, 93 S. Ct. 2607 (1973); *Hamling v. United States* 418 U.S. 87, 41 L.Ed.2d 590, 94 S. Ct. 2887 (1974). In dealing with the question of obscenity, *vel non*, we are concerned with the

status of a thing, i.e., whether or not it is protected by the First Amendment at all. Such constitutional questions are addressed first to the courts. *Jackson v. Denno* 378 U.S. 368, 12 L.Ed.2d 908, 84 S. Ct. 1774 (1964); *United States v. Wade* 388 U.S. 218, 18 L.Ed.2d 1149, 87 S. Ct. 1926 (1967) *Gilbert v. California* 388 U.S. 263, 18 L.Ed.2d 1178, 87 S. Ct. 1951 (1967); *United States v. Hashmall* (D.D.C., 1951) 97 F. Supp. 42. Although, following a judicial determination adverse to the claimant, the State may allow the jury to make a second determination, this is not required. *Jackson v. Denno*, supra; *United States v. Anderson* (2d Cir. 1968) 394 F.2d 743. The decisions of this Honorable Court indicate that these same principles apply to First Amendment questions. *Miller v. California*, supra; *Jenkins v. Georgia*, 418 U.S. 153, 41 L.Ed.2d 642, 94 S. Ct. 2750 (1974). Therefore a judge in a civil proceeding may determine the question of the obscenity, *vel non*, of a material. *Paris Adult Theator, I v. Slaton* 413 U.S. 49, 37 L.Ed.2d 446, 93 S. Ct. 2628 (1973). Since an alleged obscene publication is an object which can be brought into court and examined, and its obscenity or non-obscenity, *vel non*, can be determined from its contents, it would appear appropriate and advantageous to all concerned to determine that question in a civil *in rem* proceedings. *Hamling v. United States*, supra; *Paris Adult Theator I v. Slaton* supra; *Kaplan v. California*, 413 U.S. 115, 37 L.Ed 2d 492, 93 S. Ct. 2680 (1973); *Ginsberg v. United States* 383 U.S. 463, 16 L. Ed2d 31, 86 S. Ct. 942 (1966). *In rem* proceedings determine the status of a thing or *res* not the rights of persons. 20 Am.Jur.2d, *courts* Sections 118-119. A finding that a given copy of a publication is obscene or non-obscene binds all the world as to all substantially identical copies of the publication on the issue of obscenity, *vel non*. On receiving notice of the judicial determination, the petitioner was bound by it and was liable

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under the statute when he disregarded the judicial determination. The cases relied on by the petitioner are clearly distinguishable.

II. The Petitioner's claim that under the decision of the Alabama Supreme Court he was bound by the civil *in rem* determination of obscenity, *vel non*, goes considerably beyond the language of the State Supreme Court. The Alabama Supreme Court's opinion in the context of this case could mean no more than that the decree in the civil proceeding was *prima facie* evidence of obscenity. The language of the opinion suggests that the question could be re-opened. There were means by which the petitioner could have tested the binding effect of the civil decree, including a civil proceeding in which he would not have had to risk criminal liability. Section 4(c) of the 1969 Act, Appendix "B". He used none of these remedies. Neither the petitioner nor anyone else knows the extent to which persons who were not parties to the civil proceeding are bound by it, because no one has ever attempted to collaterally attack such a decree. And, the petitioner certainly did not here.

III. The statute requires *Scienter* in two forms: First, the accused must have knowledge of the contents of the publication, and, Second, he must know the publication to have been judicially determined to be obscene. Section 4(1) of the 1961 Act, Appendix "A". The complaint alledged both forms of *Scienter* in the petitioner. (R. 19) The evidence in this case met and considerably exceeded the minimum *Scienter* requirements laid down by this Honorable Court. *Smith v. California* 361 U.S. 147, 4 L.Ed.2d 205, 80 S. Ct. 215 (1959); *United States v. Wurzbach* 280 U.S. 396, 74 L.Ed. 508, 50 S. Ct. 167 (1930); *Hamling v. United States* 418 U.S. 87, 41 L.Ed.2d 590, 94 S. Ct. 2887 (1974).

IV. The decisions of the Alabama Supreme Court, including that issued in the instant case, hold that where prosecutions were instituted prior to the decision of this Honorable Court in *Miller v. California*, (413 U.S. 15, 37 L.Ed.2d 419, 93 S. Ct. 2607 [1973]) but where the cases were still pending after *Miller*, the materials must be obscene under both the pre-*Miller* and the *Miller* standards to sustain the prosecutions. *Pierce v. State* 292 Ala. 473, 296 So.2d 218 (1974) Cert. den. U.S. , 42 L.Ed.2d 830, 95 S. Ct. 816; *Ballew v. State*, 292 Ala. 460, 296 So.2d 206 (1974) Cert. den. U.S. , 42 L.Ed.2d 830, 95 S. Ct. 816; *McKinney v. State* 292 Ala. 484, 296 So.2d 228 (1974), (R. 2-16). This fully complies with the rules laid down by this Honorable Court. *Hamling v. United States*, 418 U.S. 87, 41 L. Ed.2d590, 94 S. Ct. 2887 (1974).

ARGUMENT

I

As the petitioner and the *amici* analyze the decision of the Supreme Court of Alabama, the petitioner was utterly bound by the civil determination of the obscenity, *vel non*, of "New Directions". In the petitioner's view, he had no opportunity to question the validity of the determination, yet he was bound by it. The Respondent State respectfully submits that this analysis of the Alabama Supreme Court's decision goes considerably beyond its language and ignores the relevent state law. These matters will be discussed in the next section, but for now, the respondent will assume the correctness of this analysis.

This is an obscenity case; it raises the question of how the obscenity of a magazine, book, film, etc. may be determined. At the outset it is essential to note that the word

"obscenity" for the purposes of state prosecutions, such as this one, denotes two bodies of materials, one necessarily included in the other but not necessarily including all of the other. The first of these includes those materials which by reason of their obscenity are excluded from the protection of the First Amendment. However, the fact that a material is obscene for First Amendment purposes does no more than deprive it of the protection of the Amendment. There is no requirement that the states outlaw materials which are obscene for First Amendment purposes. However, the states may regulate or suppress any or all such materials, limited only by the Equal Protection and Due Process provisions of the Fourteenth Amendment.

The determination of whether or not a material is obscene for First Amendment purposes is to be made on the basis of the following definition:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . [citations omitted] . . .
>
> (b) whether the work depicts or described, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24, 37 L. Ed. 2d 419, 431, 93 S. Ct. 2607 (1973).

One of the first questions which must be addressed is whether or not this determination must be by a jury. This Honorable Court has held that a jury may determine the question of obscenity for First Amendment purposes. *Miller*

v. California, 413 U.S. 15, 27, 37 L. Ed. 2d 419, 432, 93 S. Ct. 2607 (1973); *Hamling v. United States*, 418 U.S. 87, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974). On the other hand, this Honorable Court was upheld and engaged in Judicial determinations of obscenity. *Paris Adult Theater I v. Slaton* 413 U.S. 49, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973); *Jenkins v. Georgia* 418 U.S. 153, 41 L. Ed. 2d 642, 94 S. Ct. 2750 (1974).

The question of whether or not a particular expression is protected by the First Amendment is a question of constitutional rights. If the law is, and it obviously is not, that juries are the final authority on the question of obscenity, this is a rather sharp departure from the rules prevailing in other Constitutional areas. Surely, a trial judge could not wash his hands of a Fourth Amendment question and turn the matter of an alleged illegal search over to a jury. Questions relating to the voluntariness of confessions must be determined by a judge. *Jackson v. Denno*, 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774 (1964). Questions relating to the fact and the effects of constitutionally defective lineups are for the Court. *United States v. Wade* 388 U.S. 218, 242, 18 L. Ed. 2d 1149, 1166, 87 S. Ct. 1926 (1967); *Gilbert v. California*, 388 U.S. 263, 272, 18 L. Ed. 2d 1178, 1186, 87 S. Ct. 1951 (1967). Of course, all of these determinations involve findings of fact, but claims of constitutional rights are addressed first to the courts on the facts and the law. *United States v. Hashmall*, (D.D.C., 1951) 97 Fed. Supp. 42 After the court has made a determination against the constitutional claimant, the question may be referred to a jury under the law of the state. *Jackson v. Denno*, note 8, 378 U.S. 368, 378, 12 L. Ed. 2d 908, 916, 84 S. Ct. 1774 (1964) But, this is not required. *United States v. Anderson* (2nd Cir. 1968) 394 F. 2d 743, 747.

The question of First Amendment protection for alleged obscene materials is obviously one both initially and finally for the judiciary. Otherwise, there would be no way to relieve society or an individual of a jury determination finding Michaelangelo's "David" or Beethoven's Third Symphony, "Eroica", obscene. Thus, in *Jenkins v. Georgia* (418 U.S. 153, 41 L. Ed. 2d 642, 94 S. Ct. 2750 [1974]) this Honorable Court reversed a Georgia conviction on the grounds that the motion picture "Carnal Knowledge" was simply not obscene.

Taking all of this Honorable Court's decisions on this point together, especially *Miller* and *Jenkins*, it appears that the question of obscenity for First Amendment purposes is, like all other questions of constitutional rights, for the Court, which after making a determination adverse to the claimant, may, under appropriate state laws, allow the jury to make a second determination but this is not required.

If it is appropriate for a judge to determine the question of obscenity, is it necessary that the Judge be the same judge who sits on the criminal case? There appears no reason why this should be required. This Honorable Court has expressly stated that the question of the voluntariness of a confession may be determined by a judge other than the trial judge. *Jackson v. Denno*, note 19 378 U.S. 368, 391, 12 L. Ed. 2d 908, 924, 84 S. Ct. 1774, (1964). It appears to have been acceptable for Judge Hocklander to have determined the issue of obscenity, while Judge Gibson sat on the petitioner's trial.

The fact that the civil determination was made in Mobile County while the petitioner was charged with selling the magazine in Jefferson County, is not raised by the petitioner, but no doubt ought to be addressed. The law ap-

pears to be clear that a state may, though it need not, follow a statewide standard for obscenity. See *Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973) and *Jenkins v. Georgia*, 418 U.S. 153, 157, 41 L. Ed. 2d 642, 648, 94 S. Ct. 2750 (1974). Under such a statewide standard, a judge sitting in Mobile County is as competent to determine the question of obscenity as a judge sitting in Jefferson County.

Therefore, the respondent suggests that the following conclusions at this point appear obvious:

(1) The question of obscenity, vel non, for First Amendment purposes may be made by a judge without the intervention of a jury.

(2) The judge who decides the question of obscenity need not be the same judge who sits on the criminal trial.

(3) The question of obscenity may be decided by a court outside the county where the offense is committed.

The next question is: what is the nature of a finding of obscenity? In the ordinary criminal prosecution the question of obscenity is an issue between the government and the accused and its determination binds only those parties. This is because criminal prosecutions are *in personam* in nature. The result of this can be that the same materials may be found to be protected in one case and not in others. This Honorable Court has recognized this possibility and held it to be ". . . one of the consequences we accept under our jury system. . . ." *Roth v. United States*, Note 30, 354 U.S. 476, 492, 1 L. Ed. 2d 1498, 1511, 77 S. Ct. 1304 (1957) quoted and cited with approval in *Miller v California*, Note 9, 413 U.S. 15, 27, 37 L. Ed. 2d 419, 432, 93 S. Ct. 2607

(1973). There is no doubt about the need to accept such consequences. However, the specter of the sale of a given publication being protected in the case of one entrepreneur, while his competitor across the street goes to jail for selling the same publication[5], runs contrary to our principles of fair and equal treatment.

However, this sort of divergent treatment can be avoided by coming to terms with the concept of "obscenity, *vel non*". The majority of this Honorable Court has consistently held that obscenity is without First Amendment protection. See, for example, *Rosen v. United States*, 161 U.S. 29, 40 L. Ed. 606, 16 S. Ct. 434 (1896); *Roth v. United States* 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957); *Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973); and *Hamling v. United States*, 418 U.S. 87, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974). This Honorable Court has also held that certain materials may be protected by the Amendment until and unless they are sold to children or pandered. *Ginsberg v. New York*, 390 U.S. 629, 20 L. Ed. 2d 195, 88 S. Ct. 1274 (1968); *Ginsberg v. United States*, 383 U.S. 463, 16 L. Ed. 2d 31, 86 S. Ct. 942 (1966) But, when confronted with the question of obscenity, *vel non*, we are concerned, not with who is exposed to the materials nor how they are advertised but with whether they are obscene for any and all purposes. We are concerned with the legal status of the materials, whether they are obscene for First Amendment purposes or not. It is most difficult to conceive of an argument that would suggest that a given material may be obscene as between the State and one party but not obscene as between the State and another. Either, the thing is obscene or it is not. There is no halfway. The obscenity,

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[5] It could, of course, be argued that this is one of the risks one runs in operating an "Adult" bookstore.

vel non, of a publication arises from the thing itself and can be determined from the thing itself. *Hamling v. United States*, 418 U.S. 87, 100, 41 L. Ed. 2d 590, 610, 94 S. Ct. 2887 (1974); *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 56, 37 L. Ed. 2d 446, 456, 93 S. Ct. 2628 (1973); *Kaplan v. California*, 413 U.S. 115, 121, 37 L. Ed. 2d 492, 498, 93 S. Ct. 2680 (1973); *Ginzburg v. United States*, 383 U.S. 463, 465, 16 L. Ed. 2d 31, 35, 86 S. Ct. 942 (1966) Since obscene materials are physical things which can be brought into court, it would appear appropriate to address the question of obscenity, *vel non*, in an *in rem* proceeding.

In such an *in rem* proceeding, the issue of obscenity, *vel non*, can be divorced and decided separately from all other issues; such a spotlighting of the obscenity issue would obviously lead to its more accurate determination, since all matters irrelevant to the single issue of obscenity, *vel non*, could be excluded, while all matters relevant to that issue could be given proper consideration. As Mr. Justice Douglas of this Honorable Court has noted, "obscenity cases usually generate tremendous emotional outbursts." *Miller v. California*, 413 U.S. 15, 41, 37 L. Ed. 2d 419, 441 In a *in rem* civil proceeding emotionalism can be minimized, since the object of the litigation is the legal status of a thing, rather than whether or not someone is going to jail for "expressing himself" or "purveying filfth", depending upon one's point of view. *In rem* proceedings are concerned with the status of a *res* or thing, rather than the rights of persons. 20 Am. Jur 2d, *Courts*, §§ 118 and 119. In the *in rem* proceeding involved here, the sole issue was whether or not the *res*, "New Directions", No. 16, Vol. 4, was obscene. If it had been found to be not obscene, it would have been protected by the First Amendment. But, as it was, "New Directions" was found and determined to be obscene and, therefore, has no First Amendment protection.

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But, how far may this determination be extended? "New Directions" is a publication. Numerous identical copies of it could be, and indeed were, brought into the state. If one copy of "New Directions", No. 16, Vol. 4, was obscene in the community, in this case, the state as a whole, can it be denied that each and every one of the identical copies are equally obscene? Similarly, once a publication has been judged not obscene, all copies of it are due the protection of the First Amendment.

Such an approach provides a uniform determination of the obscenity issue. There are, however, other advantages to this approach. It provides sellers of questionable materials with relief from fear of prosecutions in which their only hope of avoiding punishment is to convince a jury that the publication is not obscene. This Honorable Court has often commented adversely on the "chilling" of First Amendment Freedoms. Yet, what could be more chilling to a bookstore operator than to be compelled to sell his wares in constant danger of a police raid that may come at any moment. Indeed any of the customers perusing his stock may be an undercover agent gathering evidence. On his arrest on an obscenity charge, such an operator's only hope of avoiding conviction for an ignominious crime, fines and imprisonment, would be to convince a randomly selected panel of his peers that the publication is not obscene. In the case of the operator of an "adult" bookstore, such as the petitioner, such a risk may be part of the business, but even a legitimate bookstore operator may sell a publication which he honestly believes to be not obscene yet find himself confronted with imprisonment because a jury reached the opposite conclu-

sion[6]. Where a prior civil determination of the obscenity, *vel non*, of a publication is used, the distributors and sellers are confronted with a single, relatively simple and risk free civil proceeding, rather than a multiplicity of high risk criminal prosecutions. There are advantages to the state in the use of prior civil proceedings. In a simple criminal proceeding, a finding of non-obscenity would bind the state only as to that defendant. Usually an acquittal would be based on a general "not guilty" verdict of a jury, which could be based on a finding of non-obscenity or on other findings not related to obscenity. Thus, at least theoretically, the defendant could be arrested for selling the same publication the next day. A prosecutor with charges against six different individuals for selling the same publication, who loses the verdict on the trial of the first, may feel compelled by duty to his office or political or other considerations, to pursue some or all of the others, even though he may feel little hope of success. This results in unnecessary harassment of defendants and waste of resources. By using the prior civil proceeding the State can obtain a certain and final determination of obscenity, *vel non*. If the Court finds the *res* not obscene no prosecutions may be brought for its mere sale to adults; the matter is closed once and for all, and prosecutors, police, and others can turn their attention elsewhere. On the other hand, if the *res* is found to be obscene, criminal prosecutions can be brought against all who sell the *res* after notice of the decree.

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[6] It was obviously out of concern for this problem that the Alabama Legislature provided that formal written warning would be a precondition to prosecution under the 1969 Act. Section 4(a) of the 1969 Act, Appendix "B". This Section 4(a) has now been judicially excised from the Act on the grounds that it produced a "chilling" effect. See **United Artists Corp. vs. Wright** (M.D. Ala., 1974) 368 F. Supp. 1034; **Ballew v. State** 292 Ala. 460, 296 So. 2d 206 (1974) cert. den. ___ U.S. ___, 42 L. Ed. 2d 830, 95 So. Ct. 816.

The petitioner complains that he was given no notice of the civil proceedings, yet he was bound by the civil determination of the obscenity, *vel non*, of "New Directions". This complaint ignores the nature of *in rem* proceedings. The issue in such a proceeding is not the rights of a party but the status of a thing. The purpose of joining respondents in such a proceeding, so far as the *in rem* aspect is concerned, is to provide the adversary flavor, which is an essential part of our judicial system. The statute requires the joinder of and service on the author, publisher, distributors, and sellers of the alleged obscene material, so far as these are known. Section 6(c) of the 1961 Act, Appendix "A". These are the persons and corporations which are most able and willing to put up the strongest resistence to a final determination of obscenity, *vel non*. They are also the ones most likely to seek review if there is any reason to question the trial court's determination. And, these are in the best position to inform other distributors, sellers, and interested persons, not known to the State, of the pendency of the suit, so that they can join if they wish. Section 8 of the 1961 Act, Appendix "A". Thus, whatever determination comes out of the civil proceeding, the status of the *res* will have been thoroughly and vigorously litigated. Those like the petitioner, who were not directly involved in the civil proceeding are bound by that proceeding only as to the determination of the status of the *res*. Of course, the decree could have no effect on the petitioner until he learned of it. An essential element of the *corpus delecti* of the petitioner's crime is that he knew that the *res* had been judicially declared obscene. Section 4(1) of the 1961 Act, Appendix "A". This element was proved against the petitioner by proof that he was served with written notice of the determination.

The petitioner and *amici* argue that a person ought not be bound by a determination to which he was not a party.

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But, if the civil *in rem* determination is binding only on those who are served with notice of the proceeding and given an opportunity to appear, then the State would have to ferret out each distributor and seller of a publication before it could proceed with the civil suit, by which time the matter may be mooted by the sale of all of the copies of the publication. On the other hand, if the petitioner and *amici* are correct, any outlets or individuals not served, either because the state did not find them or because they were not selling the publication at the time, would not be bound by the proceeding. This would, as a practical matter, lead to multiple civil proceedings, removing the advantage of uniformity, discussed above, from the civil proceeding. It would encourage distributors of "adult" reading matter to play a "shell game" with their merchandise, moving it from outlet to outlet as civil proceedings are filed. Finally, it must be noted that if the petitioner was not bound by the civil determination of "New Directions" obscenity, *vel non*, neither would the state have been bound by a determination that it was not obscene. Thus, in spite of such a determination, the state could file other civil proceedings or criminal prosecutions against persons who were not joined in the *in rem* proceedings. In short, if the argument of the petitioner and *amici* is accepted, all of the many advantages of the *in rem* civil proceeding, discussed above, would be wiped out.

This Honorable Court has approved the use of civil proceedings to determine obscenity, *vel non*. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973) But, these clearly are not essential to criminal prosecutions. *Miller v. California*, 413 U.S. 15. 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973); *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 54, 37 L. Ed. 2d 446, 454, 93 S. Ct. 2628 (1973); *Kaplan v. California* 413 U.S. 115, 37 L. Ed. 2d 492, 93 S. Ct. 2680 (1973) *Hamling v. United States*, 418 U.S. 87, 41 L.

Ed. 2d 590, 94 S. Ct. 2887 (1974) As discussed above, there are advantages to the State in bringing a single civil proceeding on the obscenity, *vel non*, issue prior to instituting criminal proceedings, but it would be foolish for the state to preface each criminal prosecution with a civil proceeding, when the criminal proceeding itself is sufficient.

The petitioner relies heavily on *Smith v. California* (361 U.S. 147, 4 L. Ed. 2d 205, 80 S. Ct. 215 [1959]), wherein this Honorable Court overturned a California Conviction. In *Smith* the accused had been arrested for selling an obscene book, subsequently the book was held to be obscene in a civil proceeding, and Smith was convicted without evidence of *Scienter*. This Honorable Court reversed the conviction but indicated that the result may have been different if *scienter* had been required and proven. In the instant case the statute makes knowledge both of the contents of the publication *and* of the Judicial determination of obscenity essential elements of the *corpus delecti*. The complaint alleged such knowledge, and the evidence proved that the petitioner had knowledge of the contents of "New Directions" and that he sold it, not only *after* the judicial determination, but, three (3) weeks *after* being formally advised in writing of the judicial determination. Obviously, *Smith* provides no refuge for the petitioner.

Much of what has been said about obscenity for First Amendment purposes applies to the question of obscenity for the purposes of the state statute. Once "New Directions", No. 16, Vol. 4, failed to pass First Amendment muster, it was in an area wherein the state may regulate, bound only by the Equal Protection and Due Process Requirements. As a result of the Civil Proceedings, "New Directions", No. 16, Vol. 4, was declared contraband, and any person who sold it, with the requisite knowledge was guilty under the statute.

The petitioner complains that he was denied his right to confrontation and to be presumed innocent until proven guilty. But this is not so. The *corpus delecti* of the crime of which the petitioner was convicted is as follows:

1. Selling . . .

2. With knowledge of its contents . . .

3. Obscene printed mailable matter . . .

4. Known by him . . .

5. To have been judicially found to be obscene.

Section 4(1) of the 1961 Act, Appendix "A". It was incumbent upon the state to prove and the state did prove each element of this *corpus delecti*. The state proved the the material was obscene by proof of the decree issued out of the civil proceeding. Of course, the petitioner could not have gone behind this decree, but he could have attacked the decree itself. For example, the petitioner could have raised the question of whether the *res* in the civil proceeding was the same as the copy he sold. He made no attempt to do this, but that is not the same as being unable to do it. Of course, a finding of any substantial difference between the *res* in the civil proceeding and the magazine he sold would have resulted in the automatic aquital of the petitioner, no matter how obscene the latter was in law or fact, because it was possession of the *res* which gave the Court its jurisdiction in the civil case, and the prior judicial determination of obscenity, *vel non*, and knowledge of it, are essential elements under the statute.

In *Miller v. California* Mr. Justice Douglas dissented, commenting in part:

". . . If a constitutional amendment authorized censorship, the censor would probably be an administrative agency. Then criminal prosecutions could follow as, if, and when publishers defied the censor and sold their literature. Under that regime a publisher would know when he was on dangerous ground. Under the present regime—whether the old standards or the new ones are used the criminal law becomes a trap. A brand new test would put a publisher behind bars under a new law improvised by the courts after the publication. That was done in Ginzburg and has all the evils of an ex post facto law.

"My contention is that until a civil proceeding has p'aced a tract beyond the pale, no criminal prosecution should be sustained . . ." 413 U.S. 15, 41, 37 L. Ed. 2d 419, 441.

The Respondent State respectfully submits that the statute at issue here comes very close to meeting Justice Douglas' objections. The respondent state further submits that if the objections of the petitioner and the *amici* to the statute are sustained, it would render an extremely enlightened approach to obscenity litigation, with valuable advantages to those engaged in expression, governments and society, utterly unworkable.

II

The petitioner and amici contend that the decision of Alabama Supreme Court holds that once the civil proceeding determined the obscenity of "New Directions", the Petitioner, although not a party to the civil proceeding, was utterly bound by it and could not thereafter have questioned the determination. In the previous section the respondent conceded *arguendo* that this was a proper interpretation of the

decision, since such may well be the law of Alabama. However, the respondent-state respectfully suggests that in the context of this case such an analysis goes too far.

On the trial of the case, the petitioner objected to the State's introduction of the magazine in question on the grounds that the question of obscenity, *vel non*, was not for the jury. This Honorable Court has ruled that the alleged obscene materials are best evidence on the issue of obscenity and are the only evidence the Government need enter. *Hamling v. United States* 418 U.S. 87, 100, 41 L.Ed. 2d 590, 610, 94 S. Ct. 2887 (1974); *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49, 56, 37 Ed 2d 446, 456, 93 S. Ct. 2628 (1973); *Kaplan v. California* 413 U.S. 115, 121, 37 L.Ed. 2d 492, 498, 93 S. Ct. 2680 (1973) Yet, as a result of the petitioner's objection, the magazine was admitted into evidence on the issue of sale only. (R. 80-82) The petitioner himself presented no evidence at all. And, the petitioner made no objection to the trial Court's charging the jury that the issue of obscenity was not for them.[7] The petitioner did, however, move to exclude the State's evidence, thereby raising the sufficiency of the evidence. The Alabama Supreme Court may well have viewed the issue of the case to be, whether there was any evidence at all of obscenity or, to put it another way, whether the decree from the civil proceeding was *prima facie* evidence of obscenity. The Court wrote thus on the point:

> "Neither McKinney nor the State introduced evidence in the trial on the question of obscenity, vel non. McKinney raised that issue in a motion to quash the complaint which the trial judge overruled. A motion to exclude the evi-

[7] Such an objection is essential to the preserving of error on appeal under Alabama law. **Cox v. State** 280 Ala. 318, 193 So. 2d 759 (1967); **Owens v. State** 53 Ala. App. 553, 302 So. 2d 240 (1974) Cert. den. 293 Ala. 769, 302 So. 2d 243.

> dence was also overruled by the trial court. The validity of the judgment of the Mobile Circuit Court was questioned by McKinney on objection to its introduction in evidence, first in the sense that he was not a party to the action, second that the State had to prove by affirmative evidence that the subject magazine was obscene in this trial."
>
> McKinney V. State 292 Ala. 484, 486-487, 296 So. 2d 228, 230 (R. 5)

The Court then discussed the 1961 Act and continued:

> "We now decide the question of whether the Mobile Circuit Court decree was binding on McKinney since he was not a party to the action and since obscenity, vel non, was not permitted as an issue by the trial court.
>
> "The Mobile action was in personam and in rem. The magazine, 'New Directions,' the subject matter in this case, was one of the res declared by the court to be obscene. The decree of the court, which was not appealed, established the status of the res, and the decree as to the status of the res was conclusive against all the world as to that status. [citations omitted]
>
> "*The status of the res, 'New Directions' being established, and there being no change in the standards of obscenity under the statute from the time of the Mobile hearing to the trial below no evidence of obscenity, vel non, was required in this case.*" 292 Ala. 484, 488, 296 So. 2d 228, 231 (R. 7) (Emphasis Supplied)

The sum total of the Alabama Supreme Court's decision is the statement, ". . . no evidence of obscenity, vel non, was

required in this case. . . ." This does not say that such evidence would have been improper whether offered by the State on the defense. It simply says that the decree alone was sufficient to prove obscenity. The question of whether or not the petitioner could have gone behind the decree and offered evidence on the issue of obscenity, *vel non*, is simply not presented by the case, because the petitioner offered none. The Court's language relating to possible changes in the standards of obscenity suggests that the petitioner could have raised that issue. And, the Court's detailed discussion of the contents of "New Directions" No. 16, Vol. 4, (292 Ala. 484, 485, 296 So 2d 228, 229, R 2-3) indicates that the Alabama Supreme Court examined the issue of obscenity, *vel non*, in the same way this Honorable Court did in *Jenkins* v. *Georgia* (418 U.S. 153, 41 L.Ed. 2d 642, 94 S. Ct. 2750 [1974]). All of this indicates that the issue of obscenity, *vel non*, was anything but closed by the civil proceeding.

If the issue of obscenity, *vel non*, was not closed by the prior *in rem* civil proceeding, the petitioner could have filed his own civil action under Section 4 (c) of the 1969 Act, (Appendix "B")., after he received the written notice. See *Paris Adult Theater* I v. *Slaton*, note 4, 413 U.S. 49, 55, 37. L. Ed. 2d 446, 455, 93 S. Ct. 2628 (1973). In Civil actions brought by individuals or others against would be censors, the burden is on the latter to prove obscenity. *Visual Educators v. Koeppel* 289 Ala. 410, 414, 268 So. 2d 22, 25 (1972) Thus, the petitioner could have raised the question of obscenity, *vel non*, without risking prosecution.

The point is, that the petitioner had available to him remedies by which he could have tested the binding effect of the civil decree. He made no use of these, yet he contends that he is utterly bound by it. How does he or we know?

The respondent state respectfully submits that in the context of this case, the Alabama Supreme Court's decision holds no more than that the decree from the prior adversary civil proceeding was *prima faciae* evidence of obscenity and, in the absence of other proof, was sufficient to support a conviction. The respondent-state further respectfully submits that this is patently reasonable and proper.

III

The Petitioner's arguments on *scienter* seem, with all due respect to learned counsel, to run in all directions at once. It is most difficult to tie any one of them down long enough to examine it, let alone answer it.

The Petitioner argues that the statute does not require the necessary *scienter*, yet the statute clearly requires that the accused have both knowledge of the contents and knowledge that materials had been judicial declared obscene. Section 4(1) of the 1961 Act, Appendix "A".

The Petitioner argues that the Complaint did not allege the necessary *scienter*, yet the Complaint alleges both knowledge of "New Directions" contents and knowledge that it had been judicially declared obscene (R. 19 and 21).

The evidence in this case shows the Petitioner to have been the operator of an "adult" bookstore. He offered "New Directions" for sale in a clear cellophane package which was sealed. The State offered to prove whole racks of similar publications, but, on the Petitioner's objection, it was disallowed. (R. 70-71) The Petitioner received formal written advice from State Representatives that "New Directions", No. 16, Vol. 4, had been judicially declared obscene; he did not bother to refer the notice to his attorney nor did he even

bother to preserve it for future reference. Three weeks later he was still selling "New Directions", No. 16, Vol. 4. Just before he made the sale at issue he was shown the contents of the magazine. Yet, he claims that there was no evidence that he knew that the magazine was obscene. The Petitioner operated on the principle that the less he knew about his merchandise, the better off he was;* he now seeks judicial approval for this principle.

The Petitioner's reliance on this Honorable Court's *per curiam* opinion in *Vachon v. New Hampshire* (414 U.S. 478, 38 L. Ed 2d 666, 94 S. Ct. 664 [1974] is not well placed. The evidence in that case did not show who took the child's money for the button. It could have been an employee or a customer or supplier's representative or someone on the premises to steal or commit other crimes. It could have been anyone! This Honorable Court wrote:

> ". . . In these circumstances, the conviction must be reversed. 'It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate[s] due process.'
>
> [Citations omitted]" 414 U. S. 478, 480, 38 L. Ed. 2d 666, 669.

In the instant case the uncontradicted evidence is that the Petitioner himself sold the publication three weeks after receiving formal notice that it had been judicially declared obscene and immediately after being shown its contents.

In *Smith v. California,* (361 U. S. 147, 4 L. Ed. 2d 205,

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*Perhaps he thought it would corrupt his morals.

80 S. Ct. 215 [1959]), also relied on heavily by the Petitioner, this Honorable Court wrote:

> "Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." 361 U. S. 147, 154, 4 L. Ed. 2d 205, 212.

Yet, in the instant case there was eyewitness testimony that the Petitioner was shown the contents of the magazine immediately before the sale, and the Petitioner denies nothing.

In *Miller v. California,* (413 U. S. 15, 37 L. E. 2d 419, 93 S. Ct. 2607 [1973] the majority of this Honorable Court wrote as follows:

> ". . . The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. 'The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people.' . . . [citations omitted] *But the public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.*" 413 U. S. 15, 34, 37 L. Ed. 2d 419, 437. (Emphasis Supplied)

This language indicates that a least a majority of this Honorable Court now recognizes the need to allow the states to come to terms with the problem of the commercial pornographer. Certainly this Petitioner fits into the category of one

engaged in the ". . . public portrayal of hard core sexual conduct . . . for commercial gain. . . ." *Miller*, supra. If the First Amendment protects anything at all, it protects the right of the news media to expose criminal activities, yet this Honorable Court has recognized a duty in the media to conduct a reasonable investigation into the facts before it publishes an expose. See Mr. Justice Hurlan's opinion for the majority in *Curtis Publishing Company v. Butts*, 388 U. S. 130, 158, 18 L. Ed. 2d 1094, 1113, 87 S. Ct. 1975 (1967). This being the case, is it unreasonable to suggest that the operator of an "adult" bookstore ought to reasonably inform himself of the nature and contents of his stock? Surely after receiving formal advice of a publication's having been judicially declared to be obscene, a reasonable respect for the law and concern for his business would require a merchant to take a look at one of the copies of the publication in question.

This Honorable Court has long rejected the contention that the *scienter* requirement in obscenity cases is a subjective belief that the materials are obscene. *Rosen v. United States*, 161 U. S. 29, 41, 40 L. Ed. 606, 610, 16 S. Ct. 434 (1896); *Hamling v. United States*, 418 U. S. 87, 119, 41 L. Ed. 2d 590, 622, 94 S. Ct. 2887 (1974).

This Honorable Court has written:

> "Wherever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk." *United States v. Wurzback*, 280 U. S. 396, 399, 74 L. Ed. 508, 510, 50 S. Ct. 167 (1930).

This language was recently quoted by this Honorable

Court in *Hamling v. United States*, (418 U. S. 87, 124, 41 L. Ed. 2d 590, 624, 94 S. Ct. 2887 [1974]). Clearly, the *Scienter* requirement in obscenity cases does not necessitate proof that the accused actually knew that he had crossed the line, but rather requires that the Government prove that the accused knew or ought to have known that he was close to the line. An individual who runs a business of selling materials that are close to the line established by an obscenity statute clearly does so at his own risk, and he is liable whenever he crosses the line.

The Respondent, State, respectfully submits that the requirements of the statute at issue, the allegations of the Complaint and the proof in this case meet the constitutional standards and surpass them considerably.

IV

The petitioner mounts a broad attack on the statutory definition of "obscenity." On the one hand the petitioner seems to condemn the State Trial Court for following the pre-*Miller* standards, while on the other he condemns the State Supreme Court for following the *Miller* standards. One cannot help but wish the petitioner would make up his mind.

The petitioner argues that the statute is vague. In *Hamling v. United States* (418 U.S. 87, 110, 41 L. Ed. 2d 590, 616, 94 S. Ct. 2887 [1974]) this Honorable Court once again approved Title 28 U.S.C. 1461, a criminal statute outlawing the mailing of obscene materials. 18 U.S.C. 1461 refers to obscene materials in the following words: "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance. . . ." The State statute, at issue, on the other hand, defines "obscene" this way:

"'Obscene' means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to purient interest." Section 3 of the 1961 Act, Appendix "A."

This language is considerably more definite than that approved in *Hamling*. Of course, the definition in the State statute is for use, at least initially, in a civil rather than a criminal proceeding.

In *Miller v. California* (413 U.S. 15, 37 L. Ed 2d 419, 93 S. Ct. 2607 [1973] this Honorable Court rendered an opinion whose stated and acknowledged purpose was to permit the states to suppress hardcore pornography. Yet, the petitioner argues that the first fruits of *Miller* ought to be, (1) the overturning of every then pending obscenity case, because the *memoirs*[9] standards were rejected in Miller and (2) the invalidating of every state law dealing with obscenity, because, if these were construed as following the *Miller* standards, they would be *ex post facto*. This is strange, and, more importantly, rejected in *Hamling*, supra. In that case, this Honorable Court wrote:

"The definition of obscenity, however, is not a question of fact, but one of law; the word 'obscene' as used in 18 USC § 1461, is not merely a generic or descriptive term, but a legal term of art . . . [citations omitted] . . . The legal definition of obscenity does not change with each indictment; it is a term sufficiently definite in legal meaning to give a defendant notice of the charge against him. . . ." 418 U.S. 87, 118, 41 L. Ed 2d 590, 621.

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[9] **Memoirs v. Massachusetts** 383 U.S. 413, 16 L. Ed 2d 1, 86 S. Ct. 975 (1966).

The petitioner argues that applying the *Miller* standards to him gives the statute an *ex post facto* effect. The Alabama Supreme Court has carefully considered this question and addressed it an opinion rendered shortly before the decision in the petitioner's case. *Pierce v. State* 292 Ala. 473, 296 So. 2d 218 (1974). Under the Alabama Supreme Court's views of its pre-*Miller* decisions certain materials were unprotected and banned under the *Roth-Memiors* standards. These same materials are still unprotected and banned in addition to others under the *Miller* standards. Thus, if a party was not protected under the old standards he certainly cannot complain under the new. Implicit in this and demonstrated by the Alabama Supreme Court's decisions, including the instant case, is that both sets of standards apply to the pre-*Miller* prosecution - post-*Miller* appeal cases. Thus, to sustain the conviction in such cases the Appellate Court must find the materials obscene under both sets of standards. *Pierce*, supra, was presented to this Honorable Court for review, which this Court declined to do. *Pierce v. Alabama* ___ U.S. ___, 42 L. Ed 2d 830, 95 S. Ct. 816 (1975) See also *Ballew v. State*, 292 Ala. 460; 296 So. 2d 206 (1974) cert. den. ___ U.S. ___, 42 L. Ed. 2d 830, 95 S. Ct. 816 and *McKinney v. State* 292 Ala. 484, 296 So. 2d 228 (1974) (R. 2- 16). Thus, the Alabama Law, as construed by the Supreme Court of Alabama, is not given an *ex post facto* effect and meets the requirements with regard to the retroactivity of *Miller* laid down by this Honorable Court. *Hamling v. United States* 418 U.S. 87, 101, 41 L. Ed 2d 590, 611 94 S. Ct. 2887 (1974).

CONCLUSION

In conclusion, the State of Alabama, respondent, respectfully submits that the decision of the Supreme Court of Alabama, both as interpreted by the petitioner and in light of its

own language in the context of this case, is patently correct and that the petitioner was properly convicted. The respondent respectfully submits that the decision and judgment of the Supreme Court of Alabama are due to be affirmed and the respondent prays affirmance.

Respectfully submitted,

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APPENDICIES

APPENDIX A

ACT NO. 856
ACTS OF ALABAMA, 1961
VOL. II, PAGES 1310-1316

Act No. 856 S. 242—deGraffenried.

AN ACT

To suppress traffic in obscene publications, defining terms, prescribing penalties, and providing enforcement procedures against residents or non-residents.

Be It Enacted by the Legislature of Alabama:

Section 1. TITLE. This Act shall be known as the Alabama Law on Obscenity and may be referred to by that designation.

Section 2. PURPOSE AND INTENT OF ACT. The spread of obscene publications, during the past several years, has become a matter of increasingly grave concern to the people of this State. The elimination of this evil and the consequent protection of the citizens and residents of this State against such publications are in the best interests of the morals and general welfare of the people. The accomplishment of these ends can best be achieved by providing public prosecutors both with the speedy civil remedy for obtaining a judicial determination of the character and contents of publications and with an effective power to reach non-residents responsible for the composition, publication and distribution of obscene publications within this State.

Section 3. DEFINITIONS. The following words, terms and phrases used in this Act shall, for the purpose of this Act, have the meaning respectively ascribed to them in this Section:

"Mailable matter" means (a) printed or written matter or material having second class mailing privileges under the laws of the United States; or (b) any other printed or written matter or material which has not been determined to be non-mailable under the laws of the United States.

"Obscene" means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest.

"Person" means any individual, partnership, firm, association, corporation or other legal entity.

"Printed or written matter or material" means any book, pamphlet, magazine, periodical, newspaper, picture magazine, comic book, story book, or other printed or written matter, but does not include written or printed matter or material used by or in any religious, scientific or educational institution.

Section 4. CRIMINAL PROVISIONS AND PENALTIES.

(1) Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought, into this State for sale or commercial distribution, or in this State prepares, sells, exhibits or commercially distributes, or gives away or offers to give away, or has in his possession with intent to sell or commercially distribute, or to give away or offer to give away, any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this Act, shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined not more than Two Thousand Dollars for each offense, or be both so imprisoned and fined in the discretion of the Court.

(2) Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this Act, shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months, or may be fined not more than Five Hundred Dollars for each offense, or be both so imprisoned and fined in the discretion of the Court.

Section 5. MAILABLE MATTER; COMMENCEMENT OF ACTION. Whenever the Solicitor for any Judicial Circuit or County Solicitor has reasonable cause to believe that any person, with knowledge of its contents, is (1) engaged in sending or causing to be sent, bringing or causing to be brought, into this State for sale or commercial distribution, or is (2) in this State, preparing, selling, exhibiting or commercially distributing or giving away, or offering to give away, or has in his possession with intent to sell, or commercially distribute, or to exhibit or give away or offer to give away, any obscene mailable matter, the Solicitor for the Judicial Circuit or County into which such mailable matter is sent or caused to be

sent, brought or caused to be brought, or in which it is prepared, sold, exhibited or commercially distributed or given away or offered to be given away, or possessed, may institute an action In Equity in the Circuit Court or any Court having Equity jurisdiction of the affected County for an adjudication of the obscenity of the mailable matter.

Section 6. ACTION TO DECLARE MAILABLE MATTER OBSCENE. The action authorized by Section 5 shall be commenced by the filing of a complaint to which shall be attached, as an exhibit, a true copy of the allegedly obscene mailable matter. The complaint shall:

(a) be directed against the mailable matter by name or description;

(b) allege its obscene nature;

(c) designate as Respondents and list the names and addresses, as known, of its author, publisher and any other person sending or causing it to be sent, bringing or causing it to be brought into this State for sale or commercial distribution, and of any person in this State preparing, selling, exhibiting or commercially distributing it, or giving it away or offering to give it away, or possessing it with the intent to sell or commercially distribute or exhibit or give away or offer to give it away;

(d) pray for an adjudication that it is obscene;

(e) pray for a permanent injunction against any person sending or causing it to be sent, bringing or causing it to be brought, into this State for sale or commercial distribution, or in this State preparing, selling, exhibiting or commercially distributing it, giving away or offering to give it away, or possessing it with the intent to sell or commercially distribute or exhibit or give away or offer to give it away; and

(f) pray for its surrender, seizure and destruction.

Section 7. ORDER TO SHOW CAUSE. Upon filing of the complaint, described in Section 6, the Solicitor or Register of the Court shall present the same, including the exhibit thereto, as soon as practicable to the Court for its examination. If there is no probable cause to believe that the mailable matter described in the complaint is obscene, the Court shall dismiss the complaint. If the Court finds probable cause to believe such matter to be obscene it may forthwith issue an order temporarily restraining and prohibiting the sale or distribution of such matter and it shall issue an order to show cause why the same shall not be adjudicated obscene, returnable not less than ten days after its service, directed against the mailable matter

by name or description and directing the service of a copy thereof, together with a copy of the complaint, upon such mailable matter and upon each of the Respondents named in the complaint. Service of such order shall be made upon such mailable matter at its place of publication or its editorial offices as shown therein. Service of such order may be made in any manner provided by law and, in case of mailable matter published or edited outside the State of Alabama and of any nonresident Respondent, by registered or certified mail directed to the mailable matter or the Respondent to be served at the address shown in the complaint. Proof of such mailing shall be deemed to be prima facie evidence of service of such order upon the mailable matter or any Respondent for the purposes of this Section.

Section 8. APPEARANCE, ANSWER AND TRIAL DATE.

(1) On or before the return date specified in the order to show cause, the mailable matter and each Respondent may appear and file defensive pleadings.

(2) The Court may permit any person to appear and file an answer as amicus curiae.

(3) If no person files an answer or other defense on or before the return date specified in the order to show cause, the Court may forthwith determine whether the mailable matter is obscene and enter an appropriate order.

(4) Upon the expiration of the time for filing answer and other defenses by the mailable matter and other Respondents, the Court shall set a date for the trial of the case.

Section 9. PUBLIC POLICY. PROCEDURE. The public interest requires that all actions prescribed by this Act, other than criminal actions under Section 4, be heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements, including due process, freedom of press and freedom of speech. The Rules of Civil Procedure pertaining to Equity cases shall be applicable to the trial of such actions except that the time limits therein concerning notice of trial, the presentation of evidence, and other proceedings may be shortened, if the party or parties affected or concerned have notice thereof and the Court finds the same to be in the public interest.

Section 10. DECREE. In the event the Court finds the mailable matter to be obscene, it shall enter a decree to such effect and may, in such decree or in subsequent orders of enforcement thereof:

(a) enter a permanent injunction against any Respondent, prohibiting him from doing or continuing to do any thing condemned by this Act;

(b) direct any resident Respondent to dispose of all such obscene mailable matter in his possession or under his control under such conditions and within such time as the Court may find to be reasonable;

(c) direct all Sheriffs in the State to seize and destroy all such obscene mailable matter in the possession or under the control of any Respondent who shall fail to comply with the Court's orders;

(d) enter any other and appropriate orders to effectuate the decree or injunction.

Section 11. INJUNCTION. Every order granting an injunction shall set forth the reason for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint, the act or acts restrained and shall be binding only upon the Respondents, to the action and upon those persons in active concert or participation by contract or arrangement with such Respondents who receive actual notice of the order by personal service or otherwise.

Copies of the order of the Court, finding any matter to be obscene, and all orders of injunction issued in regard thereto, shall be served upon all Respondents named in the complaint and in the manner as provided in Section 7 of this Act.

Section 12. WHEN MAILABLE MATTER IS NOT EXEMPT. Any mailable matter which is sent or caused to be sent, brought or caused to be brought into this State for sale or commercial distribution, or which in this State is sold, exhibited or commercially distributed, given away or offered to be given away or offered to be given away by any person, with knowledge of the decree finding it to be obscene, or is in the possession of any such person with intent to sell or commercially distribute or exhibit, or give away or offer to give away, is subject to the provisions of Section 4 of this Act.

Section 13. CONTEMPT. Any respondent or any person in active concert or participation by contract or agreement with such respondent, with actual notice by personal service or otherwise, of any injunction or restraining order entered pursuant to Sections 10 and 11 of this Act, and who shall disobey any of the provisions thereof, shall be guilty of contempt of Court.

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Section 14. EXTRADITION. In all cases in which a Court has entered its decree pursuant to Section 10 that the mailable matter in question is obscene, and a charge of continuing violation is thereafter brought against a person who is a Respondent to such decree, who cannot be found in this State, the Governor shall, unless such person shall have appealed from such decree and such appeal has not been finally determined, demand his extradition from the Executive Authority of the State in which such person may be found pursuant to the laws of this State.

Section 15. PRESUMPTIONS. The possession of any three of the things enumerated in Section 4 of this Act (except the possession of them for the purpose of return to the person from whom received) shall create a presumption that they are intended for sale or commercial distribution, exhibition or gift, but such presumption shall be rebuttable. The burden of proof that their possession is for the purpose of return to the person from whom received shall be on the possessor.

Section 16. NON-RESIDENTS, JURISDICTION, PROCESS, CONSENT. In order to protect the morals and general welfare of the citizens and residents of this State against obscene printed or written matter or material originating outside of this State, it is the purpose of this Section to subject to the jurisdiction of the Courts of this State those persons, including non-residents, who are responsible for the importation of such matter into this State and, by such act, submit themselves to the jurisdiction of the Court of this State and any action authorized by Section 5 of this Act.

Section 17. SEVERABILITY. If any provision, clause, sentence, paragraph, section, phrase or part of this Act, or the application thereof to any person or circumstance, is held invalid, that invalidity shall not affect any other provisions, clauses, sentences, paragraphs, sections, phrases, parts or applications of this Act which can be given effect without the invalid provision, clause, sentence, paragraph, section, phrase, part or application. To this end the provisions, clauses, sentences, paragraphs, sections, phrases or parts of this Act are declared to be severable.

Section 18. REPEAL AND SAVINGS CLAUSE. All laws and parts of laws inconsistent or in conflict with this Act are, to the extent of their inconsistency or conflict, hereby repealed. This Section shall not be construed to affect any suits pending or rights existing or any liability or penalty incurred under those laws at the time this Act shall take effect.

Section 19. This Act shall become effective upon its passage, approval by the Governor or its otherwise becoming a law.

Approved September 8, 1961
Time: 1:38 P.M.

APPENDIX B

ACT NO. 698
ACTS OF ALABAMA, 1969
VOL. II, Pages 1252-1255

AN ACT

To prohibit the exposing of obscene and harmful materials to persons eighteen years of age and older; to define terms and to prescribe penalties.

Be It Enacted by the Legislature of Alabama:

Section 1. Definitions. As used in this Act.

(a) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(b) "Sexual conduct" means act of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(c) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(d) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Obscene" means that description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest, and (ii) is patently offensive to prevailing or contemporary standards in the adult community as a whole with respect to what is suitable material, and (iii) is utterly without redeeming social value or importance.

(g) "Hard-core pornography" means material, when considered as a whole, its predominant appeal is to prurient interest, is patently offensive to prevailing or contemporary standards, is utterly without redeeming social value or importance and in addition it goes substantially beyond customary limits of candor in describing or representing such matters.

(h) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both:

(i) the character and content of any material described herein which is reasonbaly susceptible of examination by the defendant.

(ii) such term includes the calculated purveyance of filth.

(i) Mailable matter means (a) printed or written matter or material having second-class mailing privileges under the laws of the United States; or (b) any other printed or written matter or material which has not been determined to be non-mailable under the laws of the United States.

Section 2. Selling, exhibiting or possessing obsecene materials. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a person eighteen years of age or older:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is obscene or represents hard-core pornography.

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of section 2 hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is obscene or represents hard-core pornography.

(c) Nothing in this section shall be deemed to apply to mailable matter unless such mailable matter is known by such person to have been judicially found to be obscene or to represent hard-core pornography under this act or under the provisions of any other Alabama statutes.

Section 3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to another or knowingly to sell to another an admission ticket or pass or knowingly to admit another for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse which is obscene or represents hard-core pornography.

Section 4. (a) No prosecution may be commenced against any person for violating Sections 2 and 3 of this Act unless the accused is first served with prior written notice that there is

reasonable cause to believe the material upon which such prosecution is based violates this Act, and the accused has, after receiving such notice violated this Act.

(b) The written notice provided for in paragraph (a) of this Section 4 may be given by only the following officials: the State Attorney General and any Assistant Attorney General; the district attorney, county solicitor, their assistants and deputies, or any person whose office and duty is to prosecute criminal actions before any state, county or municipal court; the sheriff; the chief of police of any municipality or town; and the duly authorized law enforcement employees of the Department of Public Safety.

(c) Any person receiving such written notice provided for in paragraph (a) of this Section 4 shall have the right within 30 days from such notice to file an appropriate action for declaratory judgment to determine the validity of such written notice, but no such action shall, by reason of the commencement thereof, stay or in any way delay or postpone any prosecution for the violation of this Act.

Section 5. Any person, firm or corporation violating any provision of this Act shall be guilty of a misdemeanor and upon conviction shall be imprisoned in the county jail or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars ($2,000.00) for each offense, or be both so imprisoned and fined, in the discretion of the court.

Section 6. The provisions of this Act are cumulative and shall be in addition to any and all laws now enacted dealing with obscene or hard-core pornography and shall not be construed to limit or repeal other laws on such matters and shall specifically apply to the exposing of obscene and harmful materials to persons eighteen years of age and older.

Section 7. This Act shall become effective immediately upon its passage and approval by the Governor or upon its otherwise becoming a law.

Approved September 10, 1969.

Time: 4:20 P.M.

APPENDIX C

CROSS REFERENCE OF OFFICIAL AND UNOFFICIAL REPORTS OF STATUTES INVOLVED

OFFICIAL Act No. 856, Acts of Alabama, 1961, Vol. II., p. 1310	UNOFFICIAL Code of Alabama, 1940, (Recompiled 1958),
	Title 14
Section 1	Section 374(1)
Section 2	Section 374(2)
Section 3	Section 374(3)
Section 4	Section 374(4)
Section 5	Section 374(5)
Section 6	Section 374(6)
Section 7	Section 374(7)
Section 8	Section 374(8)
Section 9	Section 374(9)
Section 10	Section 374(10)
Section 11	Section 374(11)
Section 12	Section 374(12)
Section 13	Section 374(13)
Section 14	Section 374(14)
Section 15	Section 374(15)
Section 16	Section 374(16)
Section 17	—
Section 18	—
Section 19	—

OFFICIAL Act No. 698 Acts of Alabama 1969, Vol. II, p. 1252	UNOFFICIAL Code of Alabama 1940 (Recompiled 1958)
	Title 14
Section 1	Section 374(16j)
Section 2	Section 374(16k)
Section 3	Section 374(16l)
Section 4	Section 374(16m)
Section 5	Section 374(16n)
Section 6	Section 374(16o)
Section 7	—

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama and a member of the Bar of the Supreme Court of the United States, one of the attorneys for the Respondent, do hereby certify that on this _____ day of _____, 1975, I did serve the requisite number of copies of the foregoing Brief and Argument of the Respondent on the Attorneys for the Petitioner and the Amici Curiae by mailing said copies to them, first class postage prepaid in the case of Mr. Ritchey and air mail postage prepaid in the case of the others, and addressed as follows:

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